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Supreme Court of the United States

OCTOBER TERM, 1922.

No. [redacted]11

WALLACE BENEDICT, as Receiver in Bankruptcy of The Hub Carpet Company,
Appellant,

vs.

AARON RATNER,
Appellee.

(On Writ of Certiorari.)

BRIEF FOR APPELLEE.

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Supreme Court of the United States

OCTOBER TERM, 1922,

No. 400.

WALLACE BENEDICT, as Receiver in Bankruptcy of the Hub Carpet Company, Appellant, against AARON RATNER, Appellee.	On Writ of Certiorari.

BRIEF FOR APPELLEE.

The decision sought to be reviewed was rendered by the United States District Court for the Southern District of New York, Judge Learned Hand writing the opinion, and unanimously affirmed by the Circuit Court of Appeals, with opinion, Hough, Manton and Mayer, JJ., sitting.

Facts.

On May 23rd, 1921, as security to Aaron Ratner for loans to be made by him to the Hub Carpet Company, the latter, within the City and State of New York, executed and delivered an assignment of its accounts *due or to grow due.* As part of the transaction, which occurred a little more than four months prior to the bankruptcy of the Company, the Hub Carpet Company delivered to him a complete and detailed list of its outstanding

accounts, and on the 23rd or 24th of each following month, until and including September 24, 1921, a like list of accounts was delivered to Ratner accompanied in each instance by a letter substantially in the form of the letter delivered with the September list (fol. 183):

> "Enclosed find the September list of accounts receivable assigned to you in accordance with our agreement of May 23rd, 1921."

The assignment embraced

> "all sums of money, accounts and demands due and owing to us on our books of accounts, and such moneys, accounts and demands that will become due and owing to us, including our books of account, which may accrue and become due to us in the future in the ordinary course of business."

On the strength of this continuing collateral Ratner advanced a total of $30,000, as shown by his cancelled vouchers, $15,000 being lent as late as July 1st, 1921, barely more than two months before the filing of an involuntary petition in bankruptcy.

On September 17, 1921, Mr. Ratner learned that certain of the creditors had become dissatisfied and were pressing for payment of past due accounts. "I did not know then and certainly did not believe in the least that the company was insolvent, feeling simply that, like all businesses in times of depression it was having difficulty because of the more or less unreasonable pressure by one creditor or another" (fols. 184-6).

> "I felt that I was entitled to and I demanded the protection which by agreement had been given to me, and in reliance upon which

I had advanced the $30,000. I so expressed myself to the officers of the company on September 17, 1921, and it was agreed that I should receive the checks that would thereafter come in in connection with its accounts receivable. Thereafter, and until the appointment of the Receiver, I did receive the checks, trade acceptances and notes which came in from customers who appeared upon the books of the Hub Carpet Company as debtors, and whose names appeared on the lists delivered to me, these obligations being turned over to me in precisely the form in which they were received, and so far as I know, constituted all the obligations received by the company following my demand on September 17th" (fols. 186-187).

The total so collected during the following ten days, and preceding the filing of the petition in bankruptcy against the Hub Carpet Co. on September 26th, was $11,581.78.

The assignment provided further (fols. 32-33):

"We, the Hub Carpet Company, further covenant and agree to fully disclose our business and financial conditions at any time the said Aaron Ratner so demands and hereby authorize him to enforce this assignment at any time that in his judgment it may be for his interest to do so notwithstanding the time for the payment of the notes has not in fact accrued.

"We further covenant and agree with the said Aaron Ratner on demand to turn over to the said Aaron Ratner any and all payments made to us by our debtors and to be applied by him in payment of any obligations due him, notwithstanding that the time for the payment of said obligations held by him at that time had not in fact become due and payable."

Mr. Ratner moved for an order requiring the receiver to turn over to him the proceeds of collections of assigned accounts until the total of the advance of $30,000, with interest, would be repaid. The motion was granted in the District Court, followed by unanimous affirmance in the Circuit Court of Appeals, limited, however, to those accounts which were set out in the list last previously delivered to Mr. Ratner.

Attention is respectfully drawn to the thoughtful opinions of both Courts, the holding in each instance being rested on two grounds, viz: (a) that Mr. Ratner having taken possession of the receivables, so far as they were capable of possession, some ten days before the appointment of the receiver, the lien which he thereby "fastened" upon such receivables became complete and enforcible; and (b) that the New York rule which declares a mortgage of chattels invalid where the right of disposal is reserved in the mortgagor, is predicated on physical possession of the tangible property which thus gives rise to reputed ownership, and has no application to intangibles.

The question stated:

Where more than four months before a petition in bankruptcy is filed, an assignment is made in good faith of present and future business accounts as they accrue, as security for the repayment of advances thereupon and thereafter to be made, a full statement of these accounts being rendered regularly each month to the assignee, does the consent of the latter that the assignor may continue to collect and use the accounts until he demands that they be turned over to him render the trans-

action invalid, where such demand is made and he actually takes over the designated accounts and begins their collection prior to the filing of a petition in bankruptcy and the appointment of a receiver?

OUTLINE OF ARGUMENT.

An assignment of property to be acquired thereafter operates by way of present contract to give a lien which, *as between the parties,* takes effect and attaches to the subject of it as soon as it comes into the ownership of the assignor. Equitable liens of this character are familiar to the law.

Kribbs v. *Alford,* 120 N. Y. 524;
Greey v. *Dockendorff,* 231 U. S. 516.

Such lien becomes perfected and ripens into a right *at law* which is enforcible *against third parties* if, after the property is acquired, the assignee take possession thereof prior to an execution or attachment levy thereon, or the like, by third parties, or the appointment of a receiver upon the filing of a petition in bankruptcy by or against the assignor.

McCaffrey v. *Woodin,* 65 N. Y. 463;
Thompson v. *Fairbanks,* 196 U. S. 516.

On May 23, 1921, an agreement was made by the Hub Carpet Company with Mr. Ratner for advances which were to be secured by the then existent and future accounts receivable, upon the strength of which his advances totalled $30,000., $15,000. having been advanced

as late as July 1st. At the time of the agreement and on the 23rd day of each month thereafter, a list of the accounts receivable was delivered to Mr. Ratner, accompanied by a letter of transmittal which in each instance referred to them as accounts receivable assigned in accordance with the agreement of May 23, 1921; beginning September 17th, pursuant to the demand of Mr. Ratner under the terms of his agreement, all payments were turned over to him in the very form in which they were received, and this continued to the time of the delivery of the September 23rd list and thereafter until the filing of the petition in bankruptcy. These facts constitute the equivalent, and more than the equivalent, of taking possession of the accounts receivable to the full extent that the nature of these choses in action permitted. And since this was done before any third parties had "fastened" a lien, it is enforcible against third parties, including the receiver in bankruptcy and his successor trustee.

Bailey v. *Baker Ice Machine Co.*, 239 U. S. 275-276;
Thompson v. *Fairbanks, supra;*
McCaffrey v. *Woodin, supra;*
Sexton v. *Kessler,* 225 U. S. 90.

The agreement in question was not recorded because the recording acts of New York permit this to be done only with reference to "goods and chattels," and exclude choses in action from their operation.

Niles v. *Methusa,* 162 N. Y. 546.

The *four-month rule* does not apply to the situation since the intervening acts by which possession was taken of the after acquired accounts relate back to the date of the original agreement, which took place more than four months previously.

Bracket v. *Harvey,* 91 N. Y. 214;
Thompson v. *Fairbanks, supra;*
Sexton v. *Kessler, supra.*

Such cases as have been found which deal with the assignment of intangibles or choses in action, present or future, such as accounts, bonds, and the like, sustain the position of the appellee and entitle him to the proceeds of the balance of the accounts, at least of those accounts which were included in the list last delivered to him, until his loans are repaid in full with interest.

Stackhouse v. *Holden,* 66 A. D. (N. Y.) 423
Sexton v. *Kessler, supra;*
Greey v. *Dockendorff, supra;*
In re Michigan Furniture Company, 249 Fed. Rep. 974;
Union Trust v. *Bulkeley,* 150 Fed. Rep. 510;
In re McCauley, 158 Fed. Rep. 332.

No question of good faith exists in the case despite the elaborate argument of appellant, based upon the secrecy of the transaction, which we maintain to be a condition inherent in it and which the courts so recognize.

Greey v. *Dockendorff, supra,* at page 516;
Stackhouse v. *Holden, supra.*

Appellee willingly rests his claim of good faith upon the declaration of the Circuit Court below that

> "There is nothing in this record to warrant even a suggestion of fraud."

It is the law in New York that a mortgage of goods and chattels wherein the mortgagor reserves the right of disposal, for his own benefit, is deemed fraudulent in law and void. Upon this the appellant bases his whole appeal, his argument being that if the mortgage be thus void, though recorded, it follows that the rule must apply to all assignments or mortgages of personal property, regardless of their nature, and whether capable or incapable of reputed ownership through possession plus the reserved power of disposal. This argument we believe to be unsound, for the rule *does* rest in the original conception that the visible possession of personal property indicated ownership, a condition which cannot in its nature apply to such intangible property as choses in action, and which has never been held so to apply in any decisions which we have been able to find or which the appellant cites. The doctrine in question, based upon the conceptions of reputed ownership in the days when rights of property had their beginnings, must be deemed to be greatly out of joint with modern conceptions of industry and modes of possession; in any event, the doctrine, if it cannot be disregarded, should at least be limited and held within its present confines rather than extended into a field where it never before has played a part and where it can but serve as an embarrassment to business. Such considerations of public interest

as here exist point clearly that way, particularly since those who enter into business relations know full well that the utilization of accounts receivable, in order to keep business liquid, is one of the commonest practices of every day business.

POINT I.

By operation of the assignment a lien in equity, enforcible as between the parties, attached to the accounts receivable as soon as the assignor acquired them; this lien became perfected in law and enforcible also as to the receiver and other third parties when, pursuant to the terms of the assignment, the assignee took over these accounts before the filing of the petition in bankruptcy.

We believe appellant leads far afield in straining to apply to the assignment of choses in action, represented by accounts receivable, the rules which govern mortgages of tangible property denominated "goods and chattels". These rules, which we discuss later, cannot be permitted to divert attention from the settled principles which govern in the instant case, and which are outlined in the above head-note. Future accounts receivable, as well as those then existent, were assigned by the Hub Carpet Company to Mr. Ratner as security for moneys then owing and thereafter to be advanced to it, which advances aggregated $30,000.

With regard to such an agreement the rule, frequently declared in state and federal decisions, is that it operates

> "* * * by way of present contract to give a lien which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party."
>
> *Kribbs* v. *Alford*, 120 N. Y. p. 524.

> "A party cannot mortgage property which he does not have, but he can agree to mortgage it or give a lien upon it as soon as he gets it, and equity will enforce the agreement and establish the lien. (*Kribbs* v. *Alford*, 120 N. Y. 519; *Deeley* v. *Dwight*, 132 N. Y. 59; *Hale* v. *Omaha Nat. Bank*, 49 N. Y. 626; *Husted* v. *Ingraham*, 75 N. Y. 251; *Coats* v. *Donnell*, 94 N. Y. 168; *Hovey* v. *Elliott*, 118 N. Y. 124; *Smith* v. *Smith*, 125 N. Y. 224.)."
>
> *National Bank of Deposit* v. *Rogers*, 166 N. Y. p. 390.

See also,

McCaffrey v. *Woodin*, 65 N. Y. 463;
Field v. *New York*, 6 N. Y. 179;
Wisner v. *Ocumpaugh*, 71 N. Y. 113;
Coats v. *Donnell*, 94 N. Y. 168, 177;
Rochester Distilling Co. v. *Rosey*, 142 N. N. p. 577;
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National Bank v. *Rogers*, 166 N. Y. p. 390;
McDonnell v. *Buffalo &c Co.*, 193 N. Y. p. 104;
Central Trust Co. v. *West India Imp. Co.*, 169 N. Y. p. 323.

"The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. (*Field* v. *New York*, 6 N. Y. 179)."

Greey v. *Dockendorff*, 231 U. S., 513, 516.

See also,

Sexton v. *Kessler*, 225 U. S. 99.

Union Trust v. *Bulkeley*, 150 Fed. Rep. 510.

Boise v. *Talcott*, 212 Fed. Rep. 268.

"It is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired, will make the contractor a trustee as soon as he gets title to the thing."

Barnes v. *Alexander*, 232 U. S. 117, 121.

This doctrine of equitable lien is now quite uniformly recognized.

The validity of the assignment to Mr. Ratner is, of course, to be determined in accordance with the New York decisions.

"Whether, and to what extent a mortgage of this kind is valid, is a local question and the decisions of the State Court will be followed by this Court in such case."

Thompson v. *Fairbanks*, 196 U. S. 516.

Dooley v. *Pease*, 180 U. S. 126.

"It is 'to be borne constantly in mind, that the state law determines the efficiency of acts and transactions to effect the transfer of title of the property involved.'"

Remington on Bankruptcy, 2nd Ed. Vol. II, Secs. 1140 and 1275;

Sexton v. *Kessler*, 225 U. S. 90;

In re Doran, 154 Fed. Rep. 467.

If, therefore, it be also the law of New York that by taking possession of these accounts, (so far as they were susceptible of possession), before any rights of third parties intervened by way of attachment, levy, or receivership, Mr. Ratner's lien became "fastened", perfected and enforcible against third parties, it follows that the decision of the Court below was right and should be affirmed.

Such undoubtedly is the settled law in New York.

The lists of accounts delivered monthly by the company to Mr. Ratner with the letter of transmittal, which in each instance referred to them as "accounts receivable assigned to you in accordance with our agreement of May 23, 1921," *identified the accounts embraced in the assignment and set them aside and placed them as completely in his possession as the nature of the property permitted.* Each such letter and each such monthly list was a separate reiteration of the original agreement and a separate identification of the accounts coming within its operation, if indeed any such identification were necessary, since "all" accounts were included, and that term sufficiently identifies. (*Tailby* v. *Official Receiver* (1888), 13 A. C. 523). Beginning September 17, pursuant to the demand of Mr. Ratner under the terms of his agreement of May 23, 1921, all checks and payments were in fact turned over to him in the very form in which they were received; and this continued to the time of the delivery of the September 23rd list, and thereafter until the filing of the petition in bankruptcy. There was no further act that was legally required of the assignee in order to perfect his possession of

the choses in action represented by these receivables. There is no way by which an open account can be physically delivered (*Spring* v. *So. Carolina Ins. Co.*, 8 *Wheat*, 268), a condition which is reflected in the rule that an oral assignment of accounts receivable is perfectly valid (*In re McCauley*, 158 Fed. Rep. 322; *Union Trust Co.* v. *Bulkley*, 150 Fed. Rep. 510), and may be asserted against an assignor's trustee in bankruptcy, although the accounts remain in the assignor's possession up to the time of the bankruptcy (*idem*). Indeed, the New York Court of Appeals has directly held that not only may a chose in action be assigned by parol, but a lien upon it can be created by parol (*Williams* v. *Ingersoll*, 89 N. Y. at p. 521). It was not necessary that notice of assignment be given to the debtor in order to make the assignment effectual, even as against attaching creditors (*Williams* v. *Ingersoll, supra*, p. 522), such notice being necessary only to protect an assignee against payment by the debtor to the original creditor (*Heermans* v. *Ellsworth*, 64 N. Y., at p. 161); and merely keeping silence to the creditors, whether known or unknown, created no estoppel (*Grocy* v. *Dockendorff, supra*, p. 516). We might well argue that the various acts of Mr. Ratner in taking possession went beyond what was legally necessary, in view of the nature of the property; whatever may be argued, however, as to Mr. Ratner's rights in other circumstances, it must be clear that as to the accounts collected by him prior to such filing, and as to those included in the September 23rd list, his rights became so fastened, fixed and perfected that, until satisfied, these accounts were withdrawn from the estate to which the receiver

and the trustee later became entitled. *Mr. Ratner perfected his rights by the act of so taking possession*:

> "As soon as *that new act has intervened*, the lien of the creditor becomes perfect, and in the absence of statutory regulation, prevails over the lien of subsequent executions."
>
> *McCaffrey* v. *Woodin*, 65 N. Y., p. 463.

See also,

Grecy vs. *Dockendorff*, 231 U. S. 513;
Wilds v. *Bd. Education*, 227 N. Y., p. 217;
Hovey v. *Elliott*, 118 N. Y. 137;
Matter of Black, 138 A. D. 565;
McDonnell v. *Buffalo &c. Co.*, 193 N. Y. 104.
Gregory v. *Morris*, 96 U. S. 619;
Union Trust Co. v. *Bulkeley*, 150 Fed. Rep. 510;
Sexton v. *Kessler*, 225 U. S. 90;
Chapman v. *Hunt*, 254 Fed. Rep. 768;
Young v. *Upson*, 115 Fed. Rep. 192;
Bailey v. *Baker Ice Machine Co.*, 239 U. S., at pp. 275-276.

A study of the cases will show that this "new intervening act"—this *novus actus interveniens*—is the point about which their decision turns. It is discussed at length in *McCaffrey* v. *Woodin* (*supra*), where will be found also a full review of *Holroyd* v. *Marshall* (10 House of Lords Cases, 191), the leading English case on the subject; and many later cases in New York reiterate the rule.

'At law, a mortgage upon property not yet acquired is, according to the authorities, only a license, *until a new act intervenes.* The present case is certainly a license, and if possession be taken by the creditor, there is as much reason to connect the new intervening act with the authority, as though the instrument were in form a mortgage."

McCaffrey v. *Woodin,* 65 N. Y., pp. 464-465.

"Such an instrument, if made in good faith for a valuable consideration and not void as against public policy, operates as an executory contract to transfer such after-acquired property and creates an equitable lien thereon. (*McCaffrey* v. *Woodin, supra; Wisner* v. *Ocumpaugh,* 71 N. Y. 113; *Coats* v. *Donnell,* 94 id. 168; *Kribbs* v. *Alford,* 120 id. 519; *Cooper* v. *Douglass,* DD. *Barb.* 409.) But the legal title remains in the assignor (*Hovey* v. *Elliott,* 118 N. Y. 124, 136), and at law that title is not transferred until either the equitable lien is enforced by judicial decree *or some new act intervenes by which the assignor puts the assignee in possession thereof.* (*McCaffrey* v. *Woodin, supra,* 463, 464)."

Matter of Black, 138 A. D., p. 565.

"And as held in *McCaffrey* v. *Woodin* (*supra*), and *Gregory* v. *Morris* (96 U. S. 619), when with the equitable lien is given the *right to take the property,* the exercise of such right perfects the lien, and enables the party to assert it as a defense or in support of an action founded upon the right resulting from the execution of such power, and is supported by the lien. And in the like case of *Wisner* v. *Ocumpaugh* (71 N. Y. 113),

> the defendant was protected in the exercise of such right and the defense resting upon the lien was deemed equitable."
>
> *Hovey* v. *Elliott,* 118 N. Y., p. 137.

The Circuit Court of Appeals in *Sexton* v. *Kessler* (172 Fed. Rep., at p. 538) well sums up the point, the assignee having taken possession but fourteen days before the filing of the bankruptcy petition:

> "Doubtless a court of equity would not intervene to enforce or perfect an imperfect mortgage as against the other creditors of the mortgagor; but no such assistance would have been needed, the mortgagor having voluntarily carried out the purpose of the mortgage by delivering the securities to the mortgagee. This would have been legal, notwithstanding the insolvency of the mortgagor and the knowledge of that fact by the mortgagee. *Hauselt* v. *Harrison,* 105 U. S. 401, 26 L. Ed. 1075; *Wood* v. *U. S. Fidelity Co.* (D. C.), 143 Fed. Rep. 424."
>
> See also same case, 225 U. S., p. 99.

Thus, as between the parties, equity enforces the lien and requires that to be done which the parties agreed should be done; this "equitable lien", however, ripens into a perfected lien and right in law in the event that there be a seizure or taking of the after-acquired property after it comes into possession of the assignee, or if the equivalent be done, viz., filing a supplementary mortgage covering such chattels; such right is enforcible at law against the assignor, and against third parties also, if the intervening act or seizure or recording occur before such third parties ac-

quire a lien upon the property by attachment, levy, bankruptcy, or the like. This principle of "fastening" or perfecting a lien was enlarged upon by the Circuit Court below in its application to the case here considered and is well illustrated in its succinct review of the facts in *Bailey* v. *Baker Ice Machine Co., supra* (fols. 299-301):

> "In that case, Baker Ice Machine Co. had made an agreement with Grant Brothers for the conditional sale of a machine, the title remaining in Baker Co. until the purchase price was fully paid and the machine being in the possession of Grant Brothers.
>
> Under the recording law of Kansas, a contract of conditional sale is valid between the parties whether filed for record or not, but is void as against a creditor of the vendee 'who fastens a lien upon the property by execution, attachment or like legal process before the contract is filed for record.' The contract was made October 14, 1911, and filed for record May 15, 1912. On June 11, 1912, Grant Bros. filed their voluntary petition in bankruptcy and on the following day were adjudged bankrupts. At that time, the chattel which was the subject matter of the controversy was found in the possession of the bankrupts. Between *October 14, 1911,* and *May 15, 1912,* no creditor had 'fastened a lien upon the property by execution, attachment or other legal process.'
>
> It was contended that section 47a, clause 2 of the Bankruptcy Act, as amended in 1910, c. 412, Stat. 830, 840, give a trustee the status of a creditor having such a lien. The court held, however, 'That the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed.'"

When, therefore, Mr. Ratner from time to time received lists specifying the accounts assigned, his lien, thus "fastened" upon and perfected against such accounts, became as enforcible against the later appointed receiver of Hub Carpet Company as the happening of the equivalent event, that of recordation by the Baker Ice Machine Company on May 15, rendered the latter's lien, according to the decision of this Court, enforcible against the later appointed receiver of Grant Brothers.

The facts in *Greey* v. *Dockendorff* (supra), as we read them, went appreciably beyond those in the case at bar. There Dockendorff took by way of security an assignment of all the bankrupt's "accounts receivable thereafter to be created"; within six months after the agreement an involuntary petition was filed; the bankrupt then owed Dockendorff a large sum (p. 515)

> "for advances under the agreement, and he having received assignments of accounts from the bankrupt, as it received orders; that is, after the contract of sale was made, but before the delivery of the goods."

Thus, while Ratner had taken over fixed outstanding accounts and was engaged in their collection at the time of the appointment of the receiver, many of the accounts which Dockendorff claimed had not yet come actually into existence, for they could arise only after shipment following the orders or contracts of sale; the assignments apparently were made against the orders received, and which were thereafter to be shipped. Justice Holmes wrote for this court (p. 516):

> "The rule of the English statutes as to reputed ownership may extend to debts growing due to the bankrupt in the course of his business, but we have no such statute. The advances were the means by which the bankrupt got the ownership of the goods. The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. *Field* v. *New York*, 6. N. Y. 179, 57 Am. Dec. 435. We do not see why, in the interval between the acquisition of the goods and the specific assignment of accounts, the right of general creditors without lien should intervene, to defeat a security given in good faith, when, but for the promise of it, the property never would have come into the bankrupt's hands."

Thompson v. *Fairbanks* (supra), seems to us to present a complete parallel to the instant case. There a voluntary petition was filed on June 30, 1900, and an action was brought to recover personal property delivered by the bankrupt to Fairbanks fourteen days previously, pursuant to the terms of a chattel mortgage made long before, which included "all horses and other livery propperty that I (mortgagor) may purchase in my business or acquire by exchange." Intending to perfect his lien under this agreement, the mortgagee took possession of the livery property on May 16, with the consent of the mortgagor, at which time he knew the latter was insolvent and was intending to go into bankruptcy. This Court unanimously sustained the transaction. In doing so, and in recognition of the rule that the local law governs, it reviewed the holdings of the Vermont Courts, the transaction having arisen in that State, and declared that it had been there held (p. 522):

> "that when the mortgagee takes possession of after acquired property, as provided for in this mortgage, the lien is good and valid as against every one but attaching or judgment creditors prior to the taking of such possession.'

We may observe here that such, too, is the established law in the State of New York, as is clear from the cases hereinbefore quoted (*McCaffrey* v. *Woodin, supra; Matter of Black, supra; Hovey* v. *Elliott, supra; McDonnell* v. *Buffalo etc. Co., supra*).

In sustaining the possession of the defendant Fairbanks this Court declared, by Justice Peckham (pp. 524-525):

> "So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The Supreme Court of Vermont has held that such a mortgage gives an existing lien by contract, which may be enforced by the actual taking the possession, and such lien can only be avoided by an execution or attachment creditor whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mort-

> gage, yet, if there were no such creditors, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act."

In the cited case goods and chattels were involved and the mortgage was recorded because the state laws permitted and required it; in the instant case choses in action were involved and the assignment was not recorded because the state laws neither permitted nor required it; both instruments were equally valid; in both cases possession was taken to the extent the nature of the property permitted; and we submit *Thompson* v. *Fairbanks* as an authority precisely in point upon the law which governs the case at bar.

POINT II.

Cases which deal with the assignment of intangible property directly sustain the decision here.

Stackhouse v. *Holden,* 66 A. D. (N. Y.) 423 (accounts);
Sexton v. *Kessler,* 225 U. S. 90 (bonds);
Greey v. *Dockendorff,* 231 U. S. 513 (accounts);
Chapman v. *Hunt,* 254 Fed. Rep. 768 (accounts);
In re Michigan Furniture Co., 249 Fed. Rep. 978 (accounts).

In *Stackhouse* v. *Holden* accounts had been assigned as collateral security for the obligation of the assignor, and by the very terms of the

written agreement the latter was *authorized to collect them and use the proceeds as he saw fit until the assignee chose to take over the accounts.* The transaction was upheld. In a single paragraph, the Court summarizes and completely disposes of the whole argument here made by appellant (p. 427):

> "The rule pertaining to a change of possession of goods and chattels upon a sale thereof, or to the filing of a lien thereon, and the dominion required to be exercised by a purchaser, mortgagee or pledgee of tangible property, cannot be applied to a sale or pledge of indebtedness, intangible in itself, only the evidence of which if in writing is perceptible; the conditions are not the same, and the rules of law applicable to transfers of the two classes of property differ; as to one, the possession of which is evidence of ownership, the dealings must be open, visible and public, while as to the other the business may be, as it usually is, private. The necessities of business require it. Aside from the provision of the Bankrupt Law prohibiting preferences, and subject to the rules of law relative to transfers of goods and chattels, debtors may transfer and pledge their personal property to their creditors in any manner they see fit, and any attempt to apply fixed rules for the transaction of the business would interfere with this undoubted right."

Appellant concedes this decision is directly in point; we submit it is the law of this case.

In *Sexton* v. *Kessler, supra,* the bankrupt set aside certain securities for the defendant, reserving the right to use some of them from time to time and to substitute others in their place. With-

drawals and substitutions were made. *Possession of the original and substituted securities was retained by the bankrupt until fourteen days before the filing of a petition in bankruptcy.* At that time possession was delivered to the defendant, who knew that the pledgor had become insolvent. By the unanimous decision of this Court the rights of defendant were upheld. Not one argument here made by appellant was omitted on that appeal; Justice Holmes summarized the point of appellant's whole contention in that case, as in this (225 U. S., p. 97):

> "So the question is whether anything in the situation of fact or the rights reserved prevents the intended creation of a right *in rem*, or at least one that is to be preferred to the claim of the trustee. * * *
>
> "The most obvious objection is that the continued physical power of the New York firm over the securities and its right to withdraw and substitute, admittedly reserved, are inconsistent with a title or lien of the English house in any form."

This Court brushed aside the objection thus indicated, as well as the objection that actual delivery of the securities to defendant occurred immediately prior to the bankruptcy and therefore was presumptively fraudulent (p. 99):

> "When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York and in the absence of any controlling statute to the contrary such we understand to be what the law should be. *Parshall* v. *Eggert*, 54 N. Y. 18; *National Bank of Deposit* v. *Rogers*, 166 N. Y. 380."

Plainly the underlying principle of this decision "is this principle of exclusion from the reputed ownership rule," as the Circuit Court of Appeals points out in the case at bar (record, p. 105); indeed, on no other theory could the transaction there have been upheld, since the securities continued in the actual possession of the bankrupt until shortly before the filing of the bankruptcy petition; and this is clear (p. 99, italics ours) from the language of the Court (which at the same time distinguishes some of the cases cited here by appellant):

> "In the case of ordinary goods and chattels, where, for instance, a man mortgages his stock in trade as it may be from time to time, *retaining possession and full power to sell and replace or not as he sees fit*, it well may happen that the security fails. *Skilton* v. *Codington*, 185 N. Y. 80; *Zartman* v. *First National Bank of Waterloo*, 189 N. Y. 267 * * * the subject-matter was not goods and chattels in the sense of the New York mortgage law as we understand that law to be interpreted by the New York Courts.'

See also:

Niles v. *Mathusa*, 162 N. Y. 546;
McNeeley v. *Welz*, 166 N. Y. 128;
Union Trust Co. v. *Bulkeley*, 150 Fed. Rep. 510.

In *Chapman* v. *Hunt*, *supra*, the bankrupt by way of collateral security assigned its accounts receivable under written agreement by which the bankrupt was to collect them and use the proceeds in its business upon assigning to the defendant an equal amount of new accounts. The bankrupt proceeded with the collection of the assigned

accounts, used the proceeds in its business, and furnished monthly to Hunt a list of new assigned accounts stamped with a notice of assignment. This course was pursued for almost a year and a half. The agreement with Hunt was carried out until April 16, 1916, when he was given a new list of receivables. Two days later he arranged that the candy company take up all his notes, advanced the money with which to do so, and as security therefor received assignments of accounts, some of which were new and some of which had theretofore already been assigned to him. Hunt knew at this time, or had reasonable cause to believe, "that the candy works was insolvent." Less than a month later an involuntary petition in bankruptcy was filed against the candy works and an adjudication followed. The Circuit Court unanimously upheld the transaction, declared that the Court below was in error in holding that the transaction of April, 1916 "was an entirely new and independent one, constituting a transfer within four months of the filing of the petition," that Hunt's knowledge in April, 1916, of the company insolvency "did not make the agreement of January 13, 1915, invalid", and directed that the trustee account to Hunt. Here again the underlying "principle of exclusion from the reputed ownership rule" was applied, as pointed out in the opinion of the Court below in the case at bar.

In the last case to which we refer (*re Michigan Furniture Company, supra*) there was, as here, an assignment of accounts with the reserved right of disposal in the assignor. Judge Learned Hand on a review of the cases held the assignment good as against a trustee in bankruptcy.

The industry of appellant has enabled him to cite no cases which hold to the contrary, nor have we found any; and it is clear from the decisions discussed that the assignment here of accounts receivable falls neither within the rule which appellant invokes, nor its reason.

POINT III.

Ostensible ownership arising from physical possession is the basis of the New York rule that a chattel mortgage, though recorded, is void if the mortgagor reserve the right to dispose of the property as his own without accounting therefor to the mortgagee; such also is the principle underlying the chattel mortgage recording acts; controlling decisions exclude accounts receivable from the operation both of the rule and the statute because they are choses in action and are insusceptible of ostensible ownership.

The New York Lien Law (Sec. 230) declares that every

> "mortgage of goods and chattels * * * which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void * * * unless the mortgage or a true copy thereof is filed * * *"

The very language of the Statute shows ostensible ownership arising from physical possession to be its underlying principle. Indeed the phrase

"goods and chattels," commonly used in the various chattel mortgage recording or filing acts throughout the United States, means and is declared to mean only such property as is tangible and susceptible of physical possession; such is the settled law in New York, and elsewhere:

> "The words 'goods and chattels' do not include choses in action, but only personal property which is visible, tangible and movable (*Booth* v. *Kehoe*, 71 N. Y. 341; *State Trust Company* v. *Casino Company*, 19 App. Div. 344; *Haskins* v *.Kelly*, 24 N. Y. Super. Ct. 170; *Bacon* v. *Bonham*, 27 N. J. Eq. 212; *Kilbourne* v. *Fay*, 29 Ohio St. 264; *Marsh* v. *Woodbury*, 1 Metc. 436.)"
>
> *National Hudson Bank* v. *Chaskin*, 28 App. Div. 315.

See also

Niles v. *Mathusa*, 162 N. Y. 546;
Sexton v. *Kessler*, 225 U. S .90;
Re Michigan Furniture Co., 249 Fed. 978;
Greey v. *Dockendorff*, 231 U. S. 513;
Stackhouse v. *Holden*, 66 App. Div. 423.

We contend that it is this theory of visible, tangible possession which underlies also the New York rule that a chattel mortgage is void for presumed fraud, although recorded, where there is no change of possession and the mortgagor reserves the right of disposal for his own benefit.

It should be noted that in many and important states this rule does not obtain.

11 *Corpus Juris*, pp. ~~611-625~~. 562
18 *L. R. A.*, pp. 611-625.

The whole burden of appellant's argument and its fallacy is, that because such mortgages are invalid, despite recording, it follows that the invalidity arises from some doctrine other than that of reputed ownership; and that therefore it applies to personal property of every kind, without distinction, whether capable or incapable of visible physical possession.

Thus, at one sweep, appellant obliterates the distinction between tangible and intangible property which, recognized with the first conceptions of property in things and in rights, and developed historically, has run and still runs markedly through the law and statutes of England and the United States, and which throughout the latter is preserved in the very statutes which deal with chattel mortgages and in the decisions which uniformly interpret "goods and chattels." By the continued use of this phrase in the Recording Acts, our Legislatures have indicated the intention that this distinction continue. (5 *Am. & Eng. Ency. Law,* 2d Ed., pp. 992-993.)

It may be taken for granted that if the courts of New York intended to abolish this distinction and apply the rule in question to all classes of personal property, without exception, we should find in the many decisions which are cited by appellant in his brief at least some reference to that intention; the fact is that no such reference occurs in any of them. Standing alone and apart from the context and the circumstances of the cases in which used, the quotations offered by appellant seem for the moment persuasive, but "according to a familiar rule this language should be regarded as restrained by the circumstances in which it was used" (*Bailey* v. *Baker Ice Ma-*

chine Co. 239 U. S. 275, and cases cited). And *an examination of every case cited or quoted by appellant, without exception, will show that the language was used with reference to "goods and chattels"*—to tangible, not intangible personalty. *In re Leslie-Judge* (272 Fed. Rep. 886) presents no different aspect, for there the question concerned was the pledge of chattels as well as good will, and it was held that since good will is an intangible which cannot exist except as part of and related to the tangibles of a business, the reserved right to dispose of the latter avoided the mortgage as to both. By direct implication the case controverts appellant's position, and supports that of appellee.

It must be apparent from a reading of the cases that the rule under scrutiny has its foundation in ostensible ownership and in nothing else; and that the language used by the courts applied, and was intended to apply, only and solely to "goods and chattels."

Take, for example, the earliest federal and the earliest New York cases, respectively, cited by appellant. *Robinson* v. *Elliott,* (22 Wall. 525), from which appellant quotes at length, was decided in the year 1875; it was in fact the first case before this Court which directly involved the effect upon a chattel mortgage of the reserved power of disposal. The Court remarked that the precise question had "never before been presented" to it, and that "the cases cannot be reconciled by any process of reasoning or on any principles of law." Thereupon it proceeded to place its decision squarely upon the doctrine of ostensible ownership in language that leaves little room for the illusory theory which appellant submits:

> "Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for *men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years.* There was nothing to put creditors on their guard. On the contrary, *this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion.*"

Thus, too, the earliest New York case (no less than the later New York cases) cited by appellant shows clearly that the rule there rests on this same theory of ostensible ownership:

> "There would be no hope of maintaining honesty and fair-dealing, if the courts should allow a mortgagee or vendee to succeed in a claim to personal property against creditors and purchasers, after he had not only (a) left the property in the possession of the debtor, but (b) had allowed him to deal with and dispose of it as his own." (Letters (a) and (b) ours.)
>
> *Griswold* v. *Sheldon,* 4. N. Y. 581, 590.

A consideration of the history of the rule leaves room for no other conclusion. In early English law, the mere failure to change possession rendered the transaction void; the rigor of the rule gradually was relaxed, but never it seems to the extent of validating a transaction where both (a) possession *and* (b) the right of disposal, were reserved. While the Recording Act saved

the transaction where change of possession did not occur, it did not validate the transaction where, *coupled with this reservation of possession, there was reserved also the right of disposal.*

Probably the earliest definite English declaration of the rule and the principle upon which it is based occurs in *Twyne's* case (Coke, Part III, 80-b), decided in 1601, and cited in *Robinson* v. *Elliott, supra.* One Pierce, indebted to Twyne and others, transferred to Twyne his personal property, including sheep, in satisfaction of the debt, but nevertheless continued in possession of the property, "used them as his own," and in due time "shore the sheep and marked them with his own mark." The Court of Star Chamber,* in setting aside the transaction, declared that

> "the donor (a) *continued in possession* and (b) *used them as his own* and that by reason thereof, traded and trafficked with others and defrauded and deceived them." (Letters (a) and (b) ours.)

Later the doctrine was enacted into statute (1623; 21st James I., Ch., XIX), which, as a practice at which it expressly aimed and prohibited, recited a precise definition of this doctrine of reputed ownership:

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* "Today one who marveled what should be the reason that acts and statutes are continually made at every Parliament without intermission and without end; a wise man made a good and short answer, both which are well composed in verse:

'Quaeritur ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.'"

Twyne's Case, Coke, Part III, 80b.

> "(5) And for that it often falls out, that many Persons before they become Bankrupts, do convey their Goods to other Men upon good consideration, (a) *yet still keep the same,* and are reputed the Owners thereof, and (b) *dispose the same as their own*"—(Letters (a) and (b) ours)—

following which is the declaration that such property shall be seized and sold for the benefit of the creditors of the person in possession. (See "Secret Liens and Reputed Ownership", Elkus and Glenn, p. 176.)

The history of chattel mortgages in England paralleled that of chattel sales; and in time the rule relaxed so that the retention of possession in case of mortgage, just as in the case of sale, constituted only evidence of fraud rather than its absolute badge (*Martindale* v. *Booth,* 3 Bainewall & Adol, 498; *Jones on "Chattel Mortgages",* Sec. 379; *Randall* v. *Cook,* 17 Wend. 53):

At the time of the adoption of our Constitution the tendency in England toward the relaxation of this rule of possession was already clear with respect both to mortgages and sales, but there was no such tendency, so far as we have been able to discover, with respect to cases where continued possession was coupled with the reserved right of disposal; that remained as much a "fraud" in the eyes of the law, after the recording acts, as it had been unchangingly from the time of *Twyne's* case. And this is pointed out in *Robinson* v. *Elliott, supra* (p. 521):

> "It is true the law conferred on the parties the right to agree that the possession of the property could remain with the mortgagor, provided the mortgage be recorded; but if the

mortgage contains other provisions, which, on legal principles, vitiates the whole instrument, it is difficult to see how recording it could make it even *prima facie valid.* The Bill of Sales Registration Act in England makes void all bills of sale not filed as required, if unaccompanied by possession. An eminent writer in speaking of this act says:

"'Of course, the mere fact of due registration of a bill of sale, under this act, does not necessarily make it good against creditors. The act was not passed with a view of making good a title which was not good before, but for the protection of creditors.'"

See also,

Wood v. *Lowry,* 17 Wend. 492.

Thus, while the registration acts enabled possession to remain unchanged where before it had been a badge of fraud, and later but evidence of it, they apparently did not suffice completely to overcome the early idea as to reputed ownership due to possession *plus* the reserved right of disposal. While the recordation validated possession, it did not validate also the reserved right of disposal, and so did not make "good a title which was not good before." But clearly these two conditions or elements are but separate aspects of the same idea as to ownership, as announced in the Twyne case and the Statute of James; and it is impossible to escape the conclusion that both, separately or together, have their basis in reputed ownership flowing from physical possession. The doctrine has certainly no application to the intangible right termed a chose in action. Indeed, the conception of a right or chose in action as apart from the thing itself came much later, his-

torically, than the idea of ownership in the thing and its maintenance by occupation or possession. The very transfer of this right, after its existence became recognized, was at first prohibited "because thought to be a great encouragement to litigousness"; later it was cognizable in equity by way of declaration of trust in the assignor, in whose name alone the assignee was permitted to bring suit (*Bl. Comm., Book 2, Ch. XXV, pp. 338, 397, 441-2*).

Thus the law, distinguishing between chattels personal which on the one hand were capable of physical possession, and on the other were not capable of such possession, developed one set of rules for the one class and another set for the other, just as definitely as it distinguished real property from personal. These distinctions, while still unchanged in this country, have been altered in England by statute so far, at least, as traders' debts are concerned.

> "The rule of the English statute as to reputed ownership may extend to debts growing due to the bankrupt in the course of the business, but we have no such statute."
>
> *Greey* v. *Dockendorff, supra,* p. 515.

See also

Bktcy Act of England (1883) St. 46 &47 Vict. c. 52 sec. 44.

Sexton v. *Kessler,* 225 U. S. 90.

Stackhouse v. *Holden,* 66 A. D. 423.

> "I have found no New York case in which the question here at issue arises, except *Stackhouse* v. *Holden, supra,* which was by a divided court; but upon principle there can be no doubt that there should be no distinction between the reputed ownership arising only from possession and that arising from the

> right to dispose of the property charged. The origin of the doctrine rested upon the putative credit which the possessor was enabled to enjoy by the display of the goods. * * * the rule based upon the possessor's power of disposal in New York arose as an application of the doctrine of reputed ownership of a stock of goods, and should be as much so confined as that doctrine in its other applications."
>
> In re *Michigan Furniture Co., supra.*

There are determining reasons why this doctrine should not be extended, based upon the demands of business, no less than upon the history of the doctrine itself. The requirements of business determined the law merchant; the doctrine and laws of negotiability were evolved to give business the needed freedom in the transfer of obligations; modern business more than ever depends upon the fluidity of accounts and should not be hampered by restraints upon hypothecation, a long favored and often vital mode of procuring immediate financial support. The doctrine, founded upon early rules concerning personal property, seems greatly out of joint with and serves but to hamper modern business conditions; if not abolished or restricted, at least it should certainly not be extended. Such was the view of this Court, when, in considering the phase which dealt with the reserved right of disposal, it wrote:

> "Indeed, if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith; and it is at least worthy of thought, whether the rulings made

by the Supreme Court of Iowa do not tend to make chattel mortgages more valuable for commercial purposes, without endangering the rights of unsecured creditors. * * * Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? The owner of a stock of goods may make an absolute sale of them to his creditor, in payment of a debt. If an absolute, why not a conditional sale, with such conditions as he and his creditor may agree upon? As between the parties no court would question this right or refuse to enforce the conditions. The interests of the general public are not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement under which the mortgagor can continue in business, for in ninety-nine cases out of a hundred the taking possession by a creditor results in closing the business, and turning the debtor out of employment. * * * The fact that fraudulent relations are possible, is hardly a sufficient reason for denouncing transactions which are not fraudulent. So, if the question were open, or a new one unaffected by any settled law of the State, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith, and that the decision of the Supreme Court of Iowa rests on sound principles."

Etheridge v. *Sperry,* 139 U. S., at pp. 277-278.

POINT IV.

The good faith of the transaction is not open to question.

> "There is nothing in this record to warrant even a suggestion of fraud. The loan by Mr. Ratner and the assignment of Hub Carpet Co. of the accounts receivable, constituted a legitimate and businesslike transaction whereby a considerate father was willing to help his son and the latter's associates in maintaining what, at the time, seemed to be a hopeful business. The questions involved, therefore, are solely questions of law."

The Circuit Court below so declared (pp. 99-100, transcript of record), and disposed of the case as one of law.

Having thus treated the matter from the outset, appellant is hardly in a position now to impugn the *bona fides* of the transaction, especially since the very testimony as to secrecy which he quotes and elaborates is but a statement of what the Courts have themselves pointed out as constituting the inherent difference in dealings with tangibles and intangibles:

> "In regard to the secrecy of the lien, it may be observed that every pledge of securities may be and generally is done in secret."
>
> *Stackhouse* v. *Holden, supra,* p. 426.

> "The public was not giving credit to the New York house on the strength of its apparent ownership of these securities because it knew nothing at all about them. The *visible possession* of chattels apparently owned by the possessor creates a wholly different situation. In respect to such property the law prohibits secret liens as against creditors.

* * * * * *There was, however, as to the securities under consideration, no secrecy which was not inherent in their nature. The public does not know what stocks, bonds, or notes a merchant has, and therefore does not give him credit because of them."*

Sexton v. *Kessler,* 172 Fed. Rep., p. 539.

"It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors (*Williams* v. *Ingersoll,* 89 N. Y. 508, 522), and merely keeping silence to the latter, whether known or unknown, created no estoppel (*Wiser* v. *Lawler,* 189 U. S. 260, 270, 47 L. Ed. 802, 809, 23 Sup. Ct. Rep. 624, 22 Mor. Min. Rep. 630; *Ackerman* v. *True,* 175 N. Y. 353, 363, 67 N. E. 629)."

Greey v. *Dockendorff, supra,* 516.

In view of these decisions we do not feel called upon to follow at length the elaborations of appellant concerning fraud and fraud possibilities. It is sufficient to say that not one word, either direct or indirect, appears that a single creditor was in fact misled or defrauded, despite the lengthy record of ex-parte examinations of third persons which the appellant, as Receiver, saw fit to inject into the case. Mr. Ratner's good faith cannot be affected by the fact that his son, the latter's father-in-law, and others, may have voted emoluments to themselves, properly or not, out of corporate funds; he was never an officer, director or even stockholder of the Carpet Company, nor otherwise in any manner connected with or possessed of a voice in its affairs; his advances to the company against the assigned accounts marked the beginninng and end of his

transactions with it. That Mr. Ratner advanced to the business a total of $30,000 is not disputed. In good faith he enriched the estate to that extent at least, in reliance upon the agreement made at the outset, making an advance of $15,000 barely two months prior to the filing of an involuntary petition in bankruptcy.

There was no fraud in the transaction, either in fact or in law.

IVa. THE FOUR-MONTH RULE DOES NOT APPLY.

The monthly deliveries of lists of accounts receivable, and the taking over of those accounts, relate back to the date of the original agreement, May 23, 1921; so the cases hold, and appellant does not contend otherwise.

> "When the English firm took the securities" (fourteen days before the filing of the bankruptcy petition), 'it only exercised a right that had been created long before the bankruptcy and in good faith.'
>
> *Sexton* v. *Kessler*, 225 U. S. 99.

> "No new right or privilege was then created voidable under the bankrupt act. The delivery of those earmarked securities was in strict pursuance of the agreement made long before on the strength of which the credit was given. *Sabin* v. *Camp* (C. C.), 98 Fed. 974, cited with approval in *Thompson* v. *Fairbanks*, 196 U. S. 516, 524, 25 Sup. Ct. 306, 49 L. Ed. 577.'
>
> *Sexton* v. *Kessler*, 225 U. S. 99.

See also:

Brackett v. *Harvey*, 91 N. Y. 214;
Chapman v. *Hunt*, 254 Fed. Rep. 768;
Thompson v. *Fairbanks*, 196 U. S. 516.

POINT V.

Dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be used to procure credit or capital; the constricting rule for which appellant argues would interfere with the facilities of property transfer which business demands and courts uphold.

This, indeed, is the very view expressed by the Appellate Division of New York in the *Stackhouse* case (p. 426):

> "Dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be so used to procure credit or capital."

It is supported by the observations of the Circuit Court in this case:

> "It is a matter of common knowledge that the merchant utilizes his accounts receivable and other kinds of choses in action to keep his business liquid and everyone expects that he may sell or pledge such choses in action for that very purpose."
>
> Folio 312, transcript of record.

And long ago it was expressed by this court:

> "we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith."
>
> *Etheridge* v. *Sperry, supra*, p. 277.

This common practice of thus utilizing receivables has been long ago met by the equally common practice on the part of credit departments to demand a statement specifically of assets pledged as well as of assets and liabilities generally. The answer thus elicited gives all the information that is necessary; indeed, even without such inquiry, we do not see how an honest statement of assets and liabilities can be furnished unless it shows whether or not such a pledge has been made; and the penal laws of New York are adequate to instances of evasion in this regard. Nor does appellant's fear of the dangerous effect of upholding the validity of such a situation as is involved here find the least support in the experiences of the extensive business centres within the States where chattel mortgages are not required to be recorded at all, nor in those where, even though required to be recorded, the reserved right of disposal does not constitute fraud in law. The *Stackhouse* decision has stood unchallenged since 1901, and apparently business has continued in New York without the direful results predicted by appellant. If there had been any such experiences in the business world we would have found, if not decisions to support his position, at least some legislation designed to meet the evil. There are no such decisions, and no such statutes in New York. In any event, *the argument does not go to the validity of the transaction; at most it is addressed to the wisdom of legislative provision for recordation* of such an assignment as is here under consideration.

POINT VI.

The decision of the court below was right and should be affirmed.

All of which is respectfully submitted.

New York, April 14, 1923.

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ENB